

# Modern legal systems and the principle of “Culpa in Contrahendo”: A review of the Albanian model of pre-contractual liability on a Roman-Germanic model reference.

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## Abstract

The doctrine of “culpa in contrahendo” constitutes an integral part of the legal systems of different states, although its content differs from one country to another. “Culpa in contrahendo”, as the states with a civil law system recognize, is bound by the obligation to act in good faith during the pre-contractual phase. It represents a responsibility that derives from the injurious behavior of the party during the stage of the contract. The common problem of various modern systems lies in classifying this responsibility, and the solution that states give is expanding the meaning of the contract or the meaning of non-contractual damage, since they do not categorize it as a sui generis responsibility.

In Albanian law, there is no special provision for pre-contractual, however, the provision of Article 674 of the civil code may be considered as a basic provision that imposes liability at the negotiation stage. Regarding the nature of this responsibility, it is difficult to admit that it is of a contractual nature, when Albanian case law, despite the low number of cases, has considered it as extra contractual damage. Also, the European Court of Justice has foreseen pre-contractual liability as an extra contractual liability.

The lack of unification regarding the rights, obligations and the way of protection against damage at the pre-contractual stage may cause uncertainty, especially in international trade relations.

**Keywords:** culpa in contrahendo; pre-contractual liability; pre-contractual fault; pre-contractual damage; contractual model; extra contractual model.

## Introduction

The “culpa in contrahendo” doctrine became part of modern civil law systems and contracts by the renowned German scholar Rudolph von Jhering after an article he published in 1861 titled: “Culpa in contravention or damage from invalid or incorrect contract”, where he shed light on the roots of the culpa in concluding that, according

to him, they stem from Roman law and intended to interpret Roman law for this institute.

In ancient Rome, the obligations originated from contracts, the *ex contractu*, or from delicts, *ex delicto*. Contracts were instruments to trade, while delicts were acts with fault, punishable by law and burdened by private obligations.<sup>1</sup> However, not all obligations arise from contracts or delicts. Thus, those obligations that did not originate from contracts or from delicts, were recognized by Romans as *almost ex contractu* or *almost ex delicto*.

The Roman law divides the contract from the formation part before its final conclusion. This division was distinguished in the form chosen by the Romans to show that we were dealing with a contract. Thus, the Romans sought a certain form to distinguish the final contract from the negotiation phase, in an oral contract between the persons who have to be present, where the parties exchanged questions and answered. The creditor asked questions and indicated the terms of the contract, while the debtor could not but verbally approve these conditions.<sup>2</sup>

However, Roman law contains rules that relate to trust, care, information, and responsibility in case of failure of performance. Although Roman law does not provide the pre-contractual stage, these rules can be interpreted as part of the concept of culpa in contrahendo whereby the doctrine of culpa and controversy delivered by Jhering has also stemmed.

### **From Jhering theory to the modern concept of "culpa in contrahendo"**

For the classification of pre-contractual liability as a contractual liability, based on "fault", Jhering used different solutions that were provided by Roman law in certain situations.

Jhering's theory was based on two main bases: first, the liability arises from fault in the contract formation, and second, the classification of the damage as positive and negative.

#### *Fault and a condition of pre-contractual liability*

The general principle is "Impossibilium nulla obligation est", an impossibility imposes no liability, provided the debtor is not responsible for the impossibility, otherwise he cannot be ruled out of liability. Fault occupies an important place in Roman law for the existence of pre-contractual liability. However, not necessarily it should be in the form of dolus, the intent. In this way, standards of care are not excluded. Fault at

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<sup>1</sup> Arrigo Dernburg, *Diritto obbligazione*, pg. 31;

<sup>2</sup> Arrigo Dernburg, *Diritto obbligazione*, pg. 35;

the pre-contractual stage implies that the seller knew or should have known that the negotiations would not lead to a valid contract.

For Jhering, the fault element will have to answer a question: If a party's fault, caused by its fault, makes it liable in the face of an innocent party?! Savigny denied the existence of liability in this case because we still did not have a contract. While other lawyers, such as Scweppe and Richelmann, maintained that the party would have contractual liability and defended their thesis in the general norms and in the just justification that the judge should have.<sup>3</sup>

Based on the theory of the contractual will, Jhering thought that failure to recognize responsibility in this case would cause a lack of stability because the party could always be protected with the goals it had, regardless of what it had written or stated, and the result would be invalidity ab initio of the contract. In this way, the other party would have no way of protection and compensation for the damage caused to it due to the trust it had in the contract. The law on causing damage, in the nineteenth-century Germany, did not recognize any possibility of compensation to the injured party. Moreover, this continues to be a point that may need improvement under the German Civil Code in force.<sup>4</sup>

One of the most important contributions that Jhering has given to the German law has been the introduction of the concept of *diligentia*, care, through contract law.

Jhering argued that as in the case of existing contractual relationships, even in the case of negotiating to sign a contract, the parties should be protected from the rules not to act with negligence.<sup>5</sup> Jhering advocated the idea that these are contractual obligations because the contracting party passes from the sphere of negative extra-contractual obligations to the positive sphere of contracts. Since the purpose and natural outcome of entering into negotiations is the conclusion of a contract, the contractual obligations extend to the negotiation stage. If one party creates by its fault, a seemingly non-existent contract, it must compensate the other party for the damage caused by the belief in that appearance.<sup>6</sup>

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<sup>3</sup> Yoav Ben-Dror, *The Perennial Ambiguity of Culpa in Contrahendo*, 1983, *The American Journal of Legal History*, Vol. 27, Nr. 2, Oxford University Press, pg. 145;

<sup>4</sup> Writer's note: If we look at the provision of Article 831 of the KCG, it provides for a case of liability for causing damage by a representative of one party, namely: "... a person who uses another person to perform an act or duty is liable for the damage that the latter may to have illegally caused to a third party while performing the duty. Liability for causing damage does not apply when the person has shown reasonable care in the choice of the delegated person and on condition that he has made available to him all the material and the necessary means or whether the damage would have occurred even if this reasonable care were shown..."

<sup>5</sup> Yoav Ben-Dror, *The Perennial Ambiguity of Culpa in Contrahendo*, 1983, *The American Journal of Legal History*, Vol. 27, Nr. 2, Oxford University Press, pg. 147;

<sup>6</sup> Friedrich Kessler, *Culpa in Contrahendo, Bargaining in Good Faith, and Freedom of Contract: A Comparative Study*, 1964., Faculty Scholarship Series. Paper 2724. [http://digitalcommons.law.yale.edu/fss\\_papers/2724](http://digitalcommons.law.yale.edu/fss_papers/2724);

### *Damage. Positive and negative interest.*

According to Jhering's theory, the party must prove that it has suffered a loss as a result of the guilty conduct of the other party, where the element of fault, will, at least, require the form of negligence.

Regarding the classification of the damage, here too, Jhering made the division into positive damage and negative damage, where the positive interest includes the full interest that would be incurred if the contract had been fulfilled and the negative interest, which usually includes expenses and losses suffered because of the belief that the contract would be entered into. The first one takes as a reference the situation that the party would have if the other party would not have acted in bad faith and a valid contract would exist between the parties, with the situation in which one party is found as a result of the wrongful conduct of the other party. The second refers to the situation the party would have had if it had never entered into negotiations and the situation, which occurs as a result of the guilty conduct of the other party.

Jhering explains that, in some cases, when the party loses the opportunity to conclude another contract and this is irrevocable, it must also take the missing profit because it is directly losing money, just as notary expenses, taxes, booking fees, etc., during the negotiation phase.

Jhering chose to recognize only the negative interest for the party only during the negotiation of because the contract was never entered into due to the lack of will. However, this calculation of damage for culpa in contrasendo sheds light on the nature of this liability.

If we analyze this choice we should point out that the negative interest is applied in the cases of causing non-contractual damage. It is the fault of the promisor, who creates the responsibility and not the unrealized expectations of the other party. If we were to implement the contractual damage, there would be no room for the negative interest of the pre-contractual phase.

The influence of Jhering's theory on the Romano-Germanic system and especially on German law is seen in all of the above-mentioned elements.

### **Modern approach of "culpa in contrahendo"**

The doctrine of culpa in contrasendo is an integral part of the legal systems of different states, although its content differs from one country to another. The doctrine of culpa in contrasendo, as recognized by states with a civil law system, relates to the obligation to bring in good faith during the pre-contractual phase. It is also known in the international sale of goods. Moreover, it appears that it also exists in countries with a common law system. In all cases, the culpa in contrahendo is used to indicate

a particular type of liability for the phase before entering into the contract. The common problem of modern systems lies in the classification of this liability and the solution that states give is expanding the meaning of the contract or the meaning of non-contractual damage, not categorizing it as a *sui generis* liability.

Even the modern approach of damage in the case of controversy follows the confusing course that historically has accompanied this institute. The application of the doctrine of *culpa in contrahendo* elaborated by Jhering in Europe is that the compensation of damage on the basis of a negative interest should not exceed the amount that would be paid to compensate the damage to the extent of the positive interest.<sup>7</sup> This restriction of the right to compensation causes the pre-contractual phase not to have an entirely independent existence. Since the negative interest is aimed at regulating the situation caused by the fault of one party by returning the injured party to the situation as if it had not entered into negotiations, then it is unclear and questionable why this right should be limited in value from the value that the reimbursement may have according to the positive interest, or the profit that the party would have if the contract would have been concluded.

*The juridical nature of pre-contractual liability. The contractual and extra-contractual model.*

The study of Roman law, Jhering's theory and modern legal systems show that there is a common problem: the classification of pre-contractual liability. *Culpa in contrahendo* seems to be *sui generis*, a grey area between extra contractual damage and contractual liability.<sup>8</sup> That is why different states have chosen to classify it as a contractual or extra-contractual liability.

The main contractual model of pre-contractual liability is the German model. The pre-contractual period under German law begins at the time when one party addresses the other party in order to enter into negotiations on the conclusion of the contract and ends with the conclusion of the contract. Although the German civil code of 1990 accepted to a certain extent the idea of liability that derived from the pre-contractual stage, specifically in specific situations, in what Jhering also dealt with, the need to perceive this kind of liability as a liability having a legal cause, as a liability by law, was formed later. The case law was the one that developed the doctrine beyond the GCC (German Civil Code). Today, the concept of pre-contractual liability established by law has taken the meaning of a relationship based on faith and is mandatory due to the law.<sup>9</sup> The modernization of GCC since 2001 has made the doctrine part of the code

<sup>7</sup> See the provision of article 122 of the German Civil Code.

<sup>8</sup> Yoav Ben-Dror, *The Perennial Ambiguity of Culpa in Contrahendo*, 1983, *The American Journal of Legal History*, Vol. 27, Nr. 2, Oxford University Press, fq. 144;

<sup>9</sup> B.S Markesinis, Hannes Unberath, Angus Johnston, Lord Bingham, Gunter Hirsch, *The German law of contract, a comparative treatise*, second edition, Hart Publishing, 2006, pg. 146;

by providing for at least five areas where "culpa in contrahendo" is applied, starting from the duty to show care not to cause physical harm to the consumer at the pre-contractual stage, in holding the responsibility by the expert party in giving advice, etc. Initially, the treatment given to the pre-contractual liability was equated with the liability arising from good faith. Further, the GCC drafters put forward the idea of imposing a legal obligation to effect the remuneration or compensation of the party, whose interests had been damaged because of the trust in the contract to be entered into or the contract that was concluded but that had resulted to be invalid afterwards.

Thus Article 122 of the GCC obliges the party, who has made an invalid declaration to reward the person to whom that statement expressing the will was addressed, when the latter has entrusted in the declaration of will. This indemnity may only be sought by the party if it was not aware and could not have known that the expression of the will did not stand. Therefore, no negligent action is accepted for the requesting party. For these cases, Article 142 of the GCC provides that these contracts are null and void. So the effects of the invalidity are *ex tunc*, and it is Article 122 that gives the solution to the consequences of the compensation through the compensation of the damage.

The same is foreseen in the case when the disclosure of one party is incorrectly transmitted or the contract is invalid because the disclosure of the will was not intended to be perceived in the way that it was perceived by the other party (Article 118 of the GCC).

Significant change in the interpretation of pre-contractual liability and its implementation in practice was the provision of pre-contractual liability as a general rule set in the code. Thus, Article 311 of the GCC provides that: "1. In order to create an obligation or change its content, it is imperative that a contract be concluded between the parties, unless otherwise provided for by law. 2. An obligation under the provisions of Article 241/2 also arises through: i) the commencement of contract negotiations; (ii) the commencement of a contract in which one party, with a view to concluding a potential contract, gives the other party the opportunity to influence its rights, legal interests and other interests...".

Also, this provision also provides for the case when an obligation relationship is also created with persons, who do not intend to be themselves a party to a contract. These obligations arise especially if a third party, which has a strong trust relationship with one of the potential parties to the contract they intend to enter into, has substantially influenced the pre-contractual phase or the conclusion of the contract.

From the interpretation of the abovementioned provisions, we conclude that in order to have pre-contractual liability, according to German law, certain conditions must be met: damage must have been caused and the debtor is liable for this damage; the damage is caused to the other party in this obligation relationship and there must be

causal link between the non-performance of the obligation and the damage caused. This non-performance must have been made in the conditions when the parties have entered into a quasi-contracted relationship and one of the parties must have established an average trust that the contract will be concluded but the other party has terminated the negotiations, abusing the trust of the other party, without giving valid reasons or as a result of the distrustful behavior of the other party.

France and Italy follow the extra-contractual model of pre-contractual liability.

French law recognized the pre-contractual obligation as part of the obligation to bring in good faith. Before the fundamental changes that French civil law faced with regard to the pre-contractual part, the French Civil Code had a provision, Article 1134, which, in general terms, provides for contracts to be executed in good faith. The French doctrine, by interpreting this provision, has gone far more by absorbing within it the obligation to bring in good faith during the pre-contractual phase. Due to this evolution in practice, the changes in the French civil code reflected precisely this trend and this interpretation of the French judges and authors by recognizing to the parties rights and obligations even at the stage before the contract was concluded. In a ruling by the Chamber of Commerce of the Court of Cassation of France<sup>10</sup>, the court ruled that the liability arising from the cessation of preliminary negotiations is of an extra-contractual nature and constitutes causation of damage.

The new code directly recognizes the obligation of good faith at the pre-contractual stage. More specifically, Article 1112 provides that: "The initiation, continuation and termination of pre-contract negotiations shall be at the discretion of the parties. They must compulsorily fulfill the requirements of good faith. In cases of guilt during the negotiations, compensation for damage is not counted as a way to compensate the loss of profits expected if the contract were to have been concluded." This can be considered as a strong codification of the good faith principle because it clearly defines the compulsory nature of this principle in the pre-contractual phase and the consequences that arise if this principle is violated. Also, Article 1112-1 provides that: "The party having information that is of major importance to obtain the agreement of the other party, shall inform it, if the latter has no such information, or it has full confidence in the party that has the information." The following provision also provides for the consequences, where, apart from the compensation of the damage caused as a failure of providing information, the non-performance of this obligation may also lead to the cancellation of the contract. This provision has been given particular importance, in particular, to the obligation to provide information, thus giving it an autonomous status.

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<sup>10</sup> See: Decision no. 70-14154, on 20.03.1972, of the Commercial Chamber of the Court of Cassation of France.

Regarding the amount of compensation for the pre-contractual damage, the French legislature has limited it to the negative interest. The second paragraph of Article 1112 provides that in the event of a fault in the negotiations, the repair of damage cannot have the object of compensation for the losses incurred by not concluding the contract.

In Italian law, the provision of good faith at the pre-contractual stage is part of the civil code. Specifically, Article 1337 provides: "Negotiations and pre-contractual liability: The parties, during the negotiation and conclusion of the contract, must behave in good faith" and in Article 1338 "Knowing the Causes of Invalidity: A Party that knows or should know the existence of a cause of invalidity of the contract, and has not disclosed it to the other party, is obliged to reimburse the damage suffered by the latter because it has entrusted, without fault, to the validity of the contract." The good faith obligation contains in its essence the obligation to cooperate and exchange information for the purpose of signing the contract. Each party has an obligation to inform the other party about circumstances that are unknown to it and which may determine its will.<sup>11</sup>

The Supreme Court of Cassation outlined in one of its early decisions, the obligation of good faith: "The need for respect for trust, seen in the ethical sense, constitutes one of the main principles of the legal discipline of obligations and imposes a legally binding obligation... which is violated not only if one of the parties acts in bad faith to the other party but also when the conduct of this party is not guided by transparency, justice and a sense of social solidarity, which are an integral part of good faith; so even if this behavior is the result of neglect or even silence... it constitutes a breach of good faith if it has established reasonable trust and confidence in the other party."<sup>12</sup>

The pre-contractual liability resulting from the breach of the duty to act in good faith, according to the Italian jurisprudence, had a double limitation: a) there was no liability when entering into a valid contract and b) the liability was limited only to the extent of the negative interests.<sup>13</sup> The Cassation Court in Italy initially stated that when a valid contract is concluded, pre-conditional liability is excluded. This is of value even if the contract has been concluded in terms of incorrect behavior of one party, conduct that has led to the conclusion of a contract for the other party, which under normal circumstances would not have agreed to these terms. In this way, the case is left unprotected when the related contract is valid even though there has been misconduct and unfair behavior of any of the parties. In this situation, the

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<sup>11</sup> Francesco Galgano, *Private Law*, 1999, Luarasi, pg. 345;

<sup>12</sup> See: Decision no. 2425, on 27.10.1961, of the Supreme Court of Cassation.

<sup>13</sup> Tommaso Febbrajo, *Good faith and pre-contractual liability in Italy: Recent developments in the interpretation of article 1337 of Italian Civil Code*, *The Italian Law Journal*, Edizione Scientifiche Italiane, Nr. 2/2016, pg. 292;



conclusion of a valid contract justifies the injustice caused and can no longer be said of pre-contractual liability.

The narrow interpretation of Article 1337 caused a paradox because it was achieving the opposite goal, narrowing the limits of pre-contractual liability.

However, since the 1980s, Italian courts began to expand the sense of trust and pre-contractual responsibility, starting with the provision of setting the objective standard in the interpretation. Thus, the Supreme Court of Cassation in Italy maintains the position that the obligation of fairness and good faith must be treated in the objective sense. This is analyzed in the case of withdrawal from negotiations. When the party withdraws from the negotiations after having caused the other party to believe that the contract will be concluded, then it is deemed to have breached the obligation of good faith. It is not required for the party to have had an internal intent of bad faith, its unintentional behavior is enough, but which has produced that result.<sup>14</sup>

Now, the Italian courts, especially after the provision in the Italian Constitution of the concept of social solidarity<sup>15</sup>, recognize the fact that the notion of trust and acting on good faith also refer specifically to the negotiation stage for the conclusion of the contract, except for the stage of its execution. These obligations are added to the other obligations that the parties may have and in case of violation, the injured party is entitled to seek compensation for the damage. It is worth mentioning the position of the Italian Cassation Court in a case related to a delay caused by one party at the stage of entering into a contract.<sup>16</sup> In this case, a farmer had requested the conclusion of the electricity contract with ENEL, the only electricity distribution operator, and because of the delay in entering into a contract, he sought compensation. The court recognized the right to compensation by first recognizing the pre-contractual liability for a valid contract.

However, although the Italian jurisprudence has consistently considered pre-contractual liability as an extra-contractual responsibility, in a recent case, in 2016, it has been assessed by the court that pre-contractual liability is not an extra-contractual responsibility but a civil liability because of the social contact: "The orientation of jurisprudence has long been anchored in the traditional concept of pre-contractual liability as an aquilian liability (extra-contractual liability), based on Article 2043 of the Civil Code, according to which the burden of proof of the existence of damage caused by intent or neglect by the causer of damage is charged to the injured party and that the statutory limitation period is 5 years, in the sense of Article 2947 of the Civil Code. Moreover, this affirmation seems to be anchored in the two fundamental divisions of

<sup>14</sup> See: Decision No. 20106, on 18.09.2009 of the Supreme Court of Cassation, Decision no. 963, on 18.02.1986 of the Supreme Court of Cassation.

<sup>15</sup> Constitution of the Republic of Italy, accessed: <https://www.senato.it/documenti/repository/istituzione/costituzione.pdf>;

<sup>16</sup> See: Decision no. 10249, on 16.10.1998 of the Court of Cassation of Italy, Civil Chamber, I, 89 (1999).

the obligations: on the one hand, the obligations of the regular act imply the contract and, on the other hand, the obligations of the unlawful fact mean causing harm. There has been a third source of liabilities left out, which is provided for by Article 1173 of the Civil Code, and which relates to some special situations that cannot be included in either causing damage or in contracts, which is, however, more assimilable from the second rather than the first ". The court further states: "... The liability for damage caused to one party from the other, while deriving from the violation of specific obligations (trust, defense, information), precedents deriving from the contract, even if it is to be concluded, does not come by causing damage (*neminem laedere*); cannot qualify but as a contractual liability."

This decision, unlike the previous decisions on the nature of pre-contractual liability, may constitute an important turnaround for the Italian private law if it is followed by other decisions with the same assessment.

### **Pre-contractual liability under Albanian law**

The modern approach for damage in the negotiation phase follows the confusing course that historically has accompanied this institute. The application of the doctrine of *culpa in contrahendo* elaborated by Jhering in Europe is that the compensation of damage on the basis of a negative interest should not exceed the amount that would be paid to compensate the damage to the extent of the positive interest. This restriction of the right to compensation makes it impossible to have a completely independent pre-contractual stage. While the negative interest is aimed at regulating the situation caused by the fault of one party by returning the injured party to the situation as if it had not entered into negotiations, then it remains unclear and questionable why this right should be limited to the value of the value there may be reimbursement according to the positive interest, or the profit that the party would have if the contract would have been concluded.

Although the Albanian Civil Code does not have a special provision for pre-contractual liability, the provision of Article 674 may be considered as a basic provision providing for liability at the negotiation stage. Namely under this provision: "The parties, during the negotiations of the contract drafting, shall behave in good faith to one another. The party, who knew or ought to know the cause of the invalidity of the contract and did not disclose it to the other party, is liable to reimburse the damage suffered by the latter because it believed without fault in the validity of the contract."

This provision is made up of two paragraphs. The first paragraph requires the parties to act in good faith at the negotiation stage, while the second paragraph refers to the situation when the contract between the parties is concluded, but it is invalid because there existed a cause that one of the parties knew since the stage of the

negotiations. For this situation, the provision is more complete because it directly provides for the consequence, the damage remuneration. Although it does not provide for the compensation of damage directly, the case when the parties do not act in good faith during the pre-contractual phase is the first case bringing about the pre-contractual liability and the party causing the damage, must reimburse the damage. This norm interpretation is consistent with its purpose. This is a mandatory provision. The placement of the verb “shall behave” indicates its mandatory character for the negotiating parties.

Regarding the nature of pre-contractual liability, the terminology used in this provision leads to the orientation that we are dealing with contractual responsibilities. The provision speaks of “parties”, a concept that is closely related to the existence of a contract. Comparing it with the other provisions relating to the stages before the conclusion of the contract, such as the moment of proposal and acceptance, we again observe that in the latter the legislator has used the term “persons”, “proposer”, “recipient” and not party.

However, it is difficult to acknowledge that responsibility is of a contractual nature when the Albanian practice, even though the cases have been few, has reached the position that we are dealing with tort. Thus, in a case before the Supreme Court, one party claimed that it had suffered damages composed of expenses incurred in the amount of EUR 350.000, the loss caused by the investments made in connection with the works at Kalivaç site, the damage caused to the value of the project that can no longer be realized and the extra-contractual damage caused to the company. According to the respondent, the case has to do with the violation of the obligation freely assumed by the defendants and that by this unilateral act the latter did not sign a contract for which the parties have agreed during the negotiation phase. In its decision<sup>17</sup>, the court finds that: “15. Unlike the claims of the claimants, the Civil Panel of the Supreme Court, in considering the acts in the court file, the subject matter and cause of the lawsuit, the allegations set forth in these acts, the content of the written acts in the court file, the decision of the court, the grounds of appeal and the submissions at the Supreme Court hearing, concludes that the plaintiff’s lawsuit, the company “Kalivaç Green Energy” SHPK, has to do with the obligations arising from the causation of damage in the territory of the Republic of Albania and in such circumstances the dispute is in the jurisdiction of the Albanian courts.” Also, in determining the jurisdiction, the court refers to Law no. 10428, dated 02.06.2011 “On international private law”, and its reasoning contains the determination of the nature of this liability relationship as an extra-contractual one: “16.2. The claim that the plaintiff with the “Financial Advisory” mandate has determined that the court of competent jurisdiction for the disputes that may arise will be the Milan Court, does not constitute a legitimate cause to take

<sup>17</sup> See: Decision no. 238, 00-2015-2446, on 07.05.2015, of the Supreme Court of Republic of Albania.

this case out of the jurisdiction of the Albanian courts. 16.2.a. This is because there can be no agreement on jurisdiction in the cases of causing non-contractual damage. Such an agreement may only be made between the parties after the obligation from causing the damage arises, after the occurrence of the unlawful fact."

As we mentioned in the above decision of the Supreme Court, the law no. 10428, dated 02.06.2011 "On international private law", provides that in cases of liability during the phase before the conclusion of the contract, the damage that the parties may cause to each other is of a tort nature. Specifically, Article 70, the pre-contractual liability states: "1. The law applicable to tort obligations arising from agreements prior to the conclusion of a contract, irrespective of whether or not a contract is concluded, is the law applicable to the contract or which would apply in the event that it would have been concluded."

Also, the European Court of Justice, in the case *Fonderie Officine Meccaniche Tacconi vs. Heinrich Wagner Sinto Maschinenfabrik GmbH*<sup>18</sup>, has provided for the pre-contractual liability as a liability of a tort nature.

## Conclusions

Roman law, where we track the beginnings of "culpa in contrahendo", sought a certain form to distinguish the final contract from the negotiation phase. In addition, Roman law contains rules relating to trust, care, information, and they recognise accountability in case of non-fulfillment. Although Roman law does not provide the pre-contractual phase, these rules can be interpreted as part of the concept of culpa in contrahendo.

Referring to the German law, one of the most important contributions has been the introduction of the concept of diligence, through contract law. Jhering argued that as in the case of existing contractual relationships, even in the case of negotiating a contract, the parties should be protected from the rules not to act with negligence. While the purpose and natural outcome of entering into negotiations is the conclusion of a contract, the contractual obligations extend to the negotiation stage.

Following the same reasoning, regarding the remuneration of the damage, the party only the negative interest because the contract was never concluded because of the lack of will. This calculation of the damage to culpa in contrahendo throws light on the nature of this responsibility because the negative interest is applied in the cases of non-contractual damage. If we were to implement the contractual damage, there would be no room for the negative interest in the pre-contractual phase

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<sup>18</sup> See: *Fonderie Officine Meccaniche Tacconi spa vs Heinrich Wagner Sinto Maschinenfabrik GmbH (HWS)*, C-334/00, European Court of Justice.

Under German law, in order to have pre-contractual liability, certain conditions must be fulfilled: damage must have been incurred and the debtor is liable for this damage; the damage is caused to the other party in this relationship and there must be causal link between the non-performance of the obligation and the damage caused. This failure must be made in the conditions when the parties have entered into a quasi-contractual relationship and one of the parties must have established an average trust that the contract will be concluded but the other party has terminated the negotiations, abusing the trust of the other party, without giving a valid reason or as a result of the distrustful behavior of the other party.

France and Italy follow the extra-contractual model of pre-contractual liability. French law recognized the pre-contractual obligation as part of the obligation to act in good faith. The new code directly recognizes this obligation. Even in Italian law, the principle of good faith at the pre-contractual stage is part of the civil code. However, although the Italian jurisprudence has consistently considered pre-contractual liability as an extra-contractual liability, in a recent case, it was assessed by the court that pre-contractual liability is not a extra-contractual liability but is civil liability due to social contact. This decision, unlike the previous decisions on the nature of precontractual liability, may constitute a fundamental change in Italian private law if it is followed by other decisions with the same assessment.

The Albanian Civil Code does not have a special provision for pre-contractual liability. However, Article 674 may be considered as a basic provision providing liability at the negotiation stage. Although this provision does not provide directly the compensation of damage, the case when the parties do not act in good faith during the pre-contractual phase is the first case leading to pre-contractual liability and the injured party must be compensated for the damage. Regarding the nature of this responsibility, the terminology used in this provision leads to the orientation that we are dealing with contractual liability, while the term used in the code is "parties". However, it is difficult to consider this liability as of a contractual nature in the situation when Albanian practice, even though there have been not many cases, has held the position that we are dealing with extra-contractual damage. Also, law no. 10428, dated 02.06.2011 "On international private law", provides that in cases of liability during the phase before the conclusion of the contract, the damage that the parties may cause to each other is of an extra-contractual nature.

## Bibliography

1. Ben-Dror, Yoav. "The Perennial Ambiguity of Culpa in Contrahendo." *The American Journal of Legal History* 27.2 (1983): 142-198.
2. Çela, Ervis, and Maks Qoku. "Contractual Obligations under the Private International Law in Albania." *Academicus: International Scientific Journal* 2014.10 (2014): 170-180.
3. Dernburg, Arrigo. "Diritto delle obbligazioni." (1903)., translated from German by Francesco Bernardino Cicala, Fratelli Bocca, Torino;
4. Du Plessis, Paul J. *Borkowski's textbook on Roman Law*. Oxford University Press, USA, 2015. UET Press, ISBN: 978-99956-39-10—5;
5. Farnsworth, E. Allan. "Precontractual liability and preliminary agreements: fair dealing and failed negotiations." *Columbia Law Review* 87.2 (1987): 217-294
6. Febbrajo, Tommaso. "Good Faith and Pre-Contractual Liability in Italy: Recent Developments in the Interpretation of Article 1337 of the Italian Civil Code." *Italian LJ* 2 (2016): 291
7. Galgano, Francesco, *Private Law*, 1999
8. Kessler, Friedrich, and Edith Fine. "Culpa in contrahendo, bargaining in good faith, and freedom of contract: A comparative study." *Harvard Law Review* (1964):
9. Liçenji, Anjeza, and Kestrin Katro. "Albanian legal framework on Factoring contract." *Academicus: International Scientific Journal* 2013.8 (2013): 161-171.
10. Markesinis, Basil S., Hannes Unberath, and Angus C. Johnston. *The German Law of Contract: a comparative treatise*. Bloomsbury Publishing, 2006.

## Legislation and Law Cases

1. Law No. 7850, dated 29.07.1994, "Civil Code of the Republic of Albania".
2. Law No. 10428, dated 02.06.2011, "International private law";
3. Italian Civil Code;
4. French Civil Code;
5. German Civil Code.
6. Case no. 70-14154, date 20.03.1972, of the Court of Cassation of France;
7. Case no. 2425, date 27.10.1961, of the Supreme Court of Cassation of Italy;
8. Case no. 20106, date 18.09.2009, of the Supreme Court of Cassation of Italy,
9. Case nr. 963, datë 18.02.1986, of the Supreme Court of Cassation of Italy;
10. Case no. 10249, date 16.10.1998 of the Supreme Court of Cassation of Italy;

11. Case no. 14188, date 12.07.2016 of the Supreme Court of Cassation of Italy;
12. Case no. 238, 00-2015-2446, date 07.05.2015, of the Supreme Court of Albania;
13. Fonderie Officine Meccaniche Tacconi spa vs Heinrich Wagner Sinto Maschinenfabrik GmbH (HWS), C-334/00, European Court of Justice.